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courts of equity, *in order to defeat a fraud*, will compel the specific execution of a parol contract for the sale of lands if the contract be established by clear and convincing proof.

Jones v. Tunis, 99 Va. 220; *Hudson v. Max Meadows Co.*, Id. 537; *Langford v. Taylor*, Id. 577: The inability of a defendant to perform an alleged parol agreement when called on by a court to do so, prevents specific performance.—EDITOR VIRGINIA LAW REGISTER).

FRAUD—MISSTATEMENTS AS TO TITLE—EFFECT OF OWNER'S SILENCE.—The owners of the legal title to a group of mines being operated by a corporation pursuant to the terms of an escrow agreement which required the proceeds of operation to be applied on the purchase price, and provided for a forfeiture in case of default in payment, are not chargeable, because of their silence, with the fraud perpetrated on subscribers to the stock of such corporation by misstatements as to the corporation's title, contained in prospectuses, issued to promote the sale of its stock, although they may have known the contents of such prospectuses, and that some of the payments on account of the purchase price were from proceeds of the sales of the stock. *Wiser v. Lawler*, 21 Sup. Ct. 624.

Per Mr. Justice Brown:

"Putting the case in the most favorable light for the plaintiffs, it was only a case of estoppel by silence. Indeed, it was not even an ordinary case of estoppel by silence, but an estoppel by silence concerning facts of which defendants may have had no actual knowledge. To constitute an estoppel by silence there must be something more than an opportunity to speak. There must be an obligation. This principle applies with peculiar force where the persons to whom notice should be given are unknown. So, too, to constitute an estoppel, either by express representation or by silence, there must not only be a duty to speak, but the purchase must have been made in reliance upon the conduct of the party sought to be estopped; and the express finding of the court in this case is 'that the subscribers to the capital stock of the Seven Stars Company, in making their several subscriptions therefor and payments thereon, did so without any knowledge of, and without relying on, anything said or done, or omitted to be said or done, in the premises by the said Lawler and Wells, or either of them.' Granting that if these subscribers had known all the defendants knew regarding the title to this property, they would not have subscribed to the stock of the company, it does not follow that defendants were bound to take active steps to inform the public of that which already appeared upon the record.

"This case does not belong to that class of which *Gregg v. Von Phul*, 1 Wall. 274, 17 L. ed. 536, is an example, wherein it was said that 'if one has a claim against an estate, and does not disclose it, but stands by and suffers the estate [to be] sold and improved, with knowledge that the title has been mistaken, he will not be allowed afterwards to assert his claim against the purchaser.' Such cases are believed to be confined to those where the party's

silence is inconsistent with the position subsequently assumed by him, as where he suffers land to be improved while holding an unrecorded deed of it. In this case, however, defendant's position was perfectly consistent with their title of record and with the Cowland agreement, which distinctly provided that Cowland or his assignees should enter into possession, develop and work the mines upon their own account, though paying the proceeds to them.

"But, conceding defendants to have been apprised of the contents of the prospectus, it would certainly be an exceptional case if a person holding a deed of property which he has placed upon record would be bound to disclose his title to a person contemplating purchasing or making improvements upon the land, or would be estopped from making his claim thereto by mere silence, since he has a right to rely upon the constructive notice given by the record; although the rule would be otherwise in case of positive misrepresentations upon his part. *Brant v. Virginia Coal & I. Co.* 93 U. S. 326, 337, 23 L. ed. 927, 929; *Knouff v. Thompson*, 16 Pa. 357; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65, 8 Am. Dec. 538; *Rice v. Dewey*, 54 Barb. 455; *Kingman v. Graham*, 51 Wis. 232, 8 N. W. 181; *Sulphine v. Dunbar*, 55 Miss. 255; *Porter v. Wheeler*, 105 Ala. 451, 17 So. 221. The authorities also recognize a distinction between mere silence and a deceptive silence accompanied by an intention to defraud, which amounts to a positive beguilement. *Sumner v. Seaton*, 47 N. J. Eq. 103, 19 Atl. 884; *Hill v. Epley*, 31 Pa. 331; *Markham v. O'Connor*, 52 Ga. 183, 21 Am. Rep. 249.

"For instance, if a mortgagee stood by while a mortgagor was selling a piece of property to a person whom the mortgagee knew was purchasing the property upon the supposition that it was unencumbered, he might be estopped by his silence, even though his mortgage were of record. But, upon the other hand, if he were merely informed that the mortgagor was endeavoring to sell the property as unencumbered, he would clearly be under no obligation to look up the purchaser, or to inform the public generally of the existence of the mortgage. In such case he might safely rely upon the record. No duty to speak arises from the mere fact that a man is aware that another may take an action prejudicial to himself if the real facts are not disclosed. *Sullivan v. Davis*, 29 Kan. 28. As stated by Bigelow on Estoppel, 5th. ed. page 596: 'So long as he is not brought into contact with the person about to act, and does not know who that person may be, he is under no obligation to seek him out, or to stop a transaction which is not due to his own conduct as the natural and obvious result of it.'"

(This case should be studied carefully by all who are interested in the law of the subject. While the distinction which it enforces seems substantial and supported by the authorities, that suggested by it between mere silence and deceptive silence is a subtle one and susceptible of abuse. Thus, where do we cross the line between the harmless "mere silence" and the "deceptive silence" which equity will rebuke? As a general proposition, silence is silence, and there is about it presumably nothing else, either of word or act. We are, therefore, left to wonder what are the indicia of a silence which is adjudged to have deceived, defrauded and beguiled a pur-

chaser as against one which, in the light of this proposition, has not done so, but is nevertheless declared *obiter* by the court to entitle a sufferer to equitable relief.

Again, we are by no means certain that the doubt so guardedly expressed by the learned judge in the first sentence of the paragraph last quoted has any substance whatever under the Virginia registry statutes. They charge the world with a notice of a recorded deed or mortgage and we know of no Virginia case even hinting at the necessity suggested—that a mortgagee of a recorded mortgage, standing by at a sale of the mortgaged property, must under peril of losing his priority, notify a purchaser of the existence of his lien. The establishment of such a doctrine would shake many a title and defeat the main object of the registry statutes—namely, reference of the purchaser *to the records alone* for his assurance and the reduction to its potential minimum of the value of evidence *aliunde* as to whether the prior incumbrancer was “deceptively silent” or only “merely” so.—EDITOR VIRGINIA LAW REGISTER).